

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

NORA E NIVERTH
Claimant

APPEAL NO. 07A-UI-06641-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DAC INC
Employer

OC: 05/27/07 R: 12
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Nora E. Niverth (claimant) appealed a representative's June 25, 2007 decision (reference 03) that concluded she was not qualified to receive unemployment insurance benefits, and the account of DAC, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 23, 2007. The claimant participated in the hearing. David Smith, the director of operations, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 23, 2006. The employer took over the business entity that the claimant had been working for on June 23. The claimant worked part-time as a housekeeper and direct care provider. When the claimant started working for the employer, she received a copy of the employer's policies. One of the policies informed employees they could be discharged for excessive absenteeism. The employer's attendance policy goes through a progressive discipline process. Typically, when the progressive disciplinary procedure is followed, an employee is discharged when she accumulates six attendance points.

During her employment, the claimant received a written warning on October 17, 2006, for accumulating 6.5 attendance points. On November 6, 2006, the claimant received a one-day suspension for attendance issues. The claimant had 7.5 attendance points as of November 6, 2006. The claimant reduced her attendance points between November 6, 2006, and February 6, 2007. In early February, when she was unable to work as scheduled because of adverse weather conditions, the employer gave her a two-day suspension. As of February 6, 2007, the claimant had six attendance points. As of March 30, 2007, the claimant had accumulated a total of 8.5 attendance points and received a three-day suspension. The

claimant understood her job was in jeopardy and she needed perfect attendance to reduce her attendance points. As a result of perfect attendance, the claimant had reduced her attendance points to 6.5 as of May 27, 2007.

On May 28, 2007, the claimant did not feel well and had flu-like symptoms. The claimant properly notified the employer she was ill and unable to work as scheduled. As a result of this absence, the claimant received one attendance point. On May 29, 2007, the claimant still did not feel well, but went to work anyway. Even if the claimant had provided a doctor's excuse, she would have received one point for the May 28 absence. The employer discharged the claimant on May 29, 2007, because she violated the employer's attendance policy by accumulating 7.5 attendance points.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7). Also, while past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

The employer established business reasons for discharging the claimant based on the number of attendance points she had accumulated. The facts do not, however, establish that the claimant intentionally failed to work as scheduled. Instead, the facts establish that since the claimant's one-day suspension in early November 2006, she tried to have perfect attendance to reduce her attendance points. The claimant had some months of perfect attendance, which reduced her accumulated attendance points.

On May 28, 2007, the claimant did not work as scheduled because she was ill and unable to work. Even though the employer discharged her for accumulating too many attendance points, she did not commit a current act of work-connected misconduct. As of May 27, 2007, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's June 25, 2007 decision (reference 03) is reversed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of May 27, 2007, the claimant is qualified to receive unemployment insurance benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/kjw